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No. _____

IN THE

Supreme Court of the United States

IN THE MATTER OF JOHN P. COALE,
Petitioner.

Petition for a Writ of Certiorari to the Supreme Court of Indiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may properly exercise jurisdiction in a disciplinary action against an attorney who is not admitted to the bar of the State, not admitted to any court in the State on a *pro hac vice* basis, has not participated in a pending legal proceeding in the State, has not dispensed legal advice or otherwise acted as an adviser or counselor to a prospective or actual client in the State, and, where no private citizen of the State has filed a complaint of misconduct against the attorney.

2. Whether the Due Process guarantee of a neutral tribunal is violated when members of the court that renders the final decision in a disciplinary proceeding hold a press conference prior to judging the merits of the proceeding, for the purpose of commenting publicly, and in a disparaging manner, on the conduct at issue in the proceeding

3. Whether an attorney can be found guilty of violating the rules of professional conduct of a state bar to which he is not admitted when there is no evidence that the attorney engaged in the practice of law in the state or had any contact with a resident of the state.

Rule 14.1(b) Statement

Pursuant to Supreme Court Rule 14.1(b), petitioner states that, in addition to John P. Coale, petitioner here (respondent below), Phillip B. Allen was a respondent below. The Indiana Disciplinary Commission was the complainant below and is the respondent herein.

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OPINIONS BELOW

The opinion of the Hearing Officer finding a violation of the Indiana Rules of Professional Conduct by petitioner is unreported and reproduced at App. 12a-17a. The opinion of the Indiana Supreme Court affirming the decision of the Hearing Officer is reported at 775 N.E.2d 1079 (Ind. 2002) and reproduced at App. 1a-11a.

JURISDICTION

The Indiana Supreme Court entered its judgment on July 29, 2002. App. 1a. On October 17, 2002, Justice Stevens extended the time within which to file a petition for writ of certiorari to November 27, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., Art. XIV, § 1.

Admission and Discipline Rule 23 of the Indiana Rules of Admission and Discipline is reproduced, in pertinent part, at App. 28a-39a.

Rule 7.1 of the Indiana Rules of Professional Conduct is reproduced at App. 24a-25a.

Rule 7.3 of the Indiana Rules of Professional Conduct is reproduced at App. 26a.

Rule 8.4 of the Indiana Rules of Professional Conduct is reproduced at App. 27a.

Trial Rule 4.4 of the Indiana Rules of Civil Procedure is reproduced at App. 40a-41a.

STATEMENT OF THE CASE

1. *Introduction*

In 1993 petitioner, a Washington, D.C. attorney, found himself the subject of a disciplinary proceeding in Indiana, where he had never been admitted to the bar or sought admission *pro hac vice* and where he had never practiced law. Petitioner found himself defending this proceeding before a court where, prior to judging the merits of the case, two of the five justices (one of whom was the Chief Justice) had held a press conference for the express purpose of publicly condemning the very conduct (i.e. direct mail solicitation) at issue in the proceeding.

The charge against petitioner was that his firm's brochure violated the Indiana Rules of Professional Conduct in three ways: 1) it contained certain types of prohibited statements; 2) it was not imprinted with the words "Advertising Materials," and; 3) it was not filed with the Indiana Disciplinary Commission prior to its dissemination.

The disciplinary proceedings against petitioner inexplicably lasted nine years. During that time, petitioner raised constitutional, legal and procedural challenges to the proceedings. The Indiana Supreme Court, at every turn, summarily rejected petitioner's arguments and constitutional challenges or simply declined to consider them at all. Moreover, when it appeared that respondent, the Indiana Disciplinary Commission, was losing its case against petitioner the Indiana Supreme Court stepped in, *sua sponte*, to assist respondent with its arguments and the presentation of its case and to waive its own rules for the benefit of respondent.

Despite having nine years within which to develop its case, the Indiana Disciplinary Commission, never adduced any evidence to prove petitioner contacted any citizen of the State of Indiana. Indeed, respondent never proved that

petitioner took any action whatsoever or that the Indiana Rules of Professional Conduct even applied to petitioner's brochure.

Even with this complete failure of the evidence, petitioner was found guilty of violating Indiana's Rules of Professional Conduct concerning attorney advertising and was disciplined by the Indiana Supreme Court. In the process of reaching this conclusion the Indiana Supreme Court simply ignored dispositive evidentiary issues raised and fully briefed by petitioner: no mention of them was made at all. The Indiana Supreme Court even went so far as to disregard, in its entirety, petitioner's timely submission to the hearing officer on the grounds that it was not "file stamped." Although the hearing officer stated in his opinion that he had read petitioner's submission, the court ignored this fact, stating, "the chronological case summary does not indicate that that document was ever filed before the hearing officer." In this way, the court was able to avoid reaching the merits of petitioner's arguments, which would have disposed of the matter favorably to petitioner.

As a result of the discipline imposed on him, petitioner is "barred from acts constituting the practice of law" in Indiana.

2. *The Procedure Governing Attorney Disciplinary Actions in Indiana*

In Indiana, disciplinary actions are conducted in accordance with the Admission and Discipline Rules and are presided over by the Indiana Supreme Court. The Indiana Supreme Court "has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of this court or who practices law in the state . . . is charged with misconduct." App. 28a [1] The Disciplinary Commission, a

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[1] The complaint against petitioner was filed in 1993 and was based upon conduct alleged to have occurred in 1992. The relevant rule of procedure is the 1993 version of Admission and Discipline Rule 23, while the relevant Rules of Professional Conduct are those of 1992.

regulatory arm of the Supreme Court, is charged with investigating and prosecuting attorney grievances.

Once a complaint is filed against an attorney, the Indiana Supreme Court appoints a hearing officer to preside over the disciplinary hearing. The hearing officer is the functional equivalent of a trial court judge. The adjudicative stage of the proceedings then ordinarily begins with an adversarial hearing before the hearing officer; however, the parties may dispense with the hearing by agreement and submit the matter to the hearing officer for a decision on a stipulated record. After the hearing, or, if a hearing has been waived, after the paper submissions of the parties, the hearing officer "shall determine whether misconduct has been proven by clear and convincing evidence and shall submit to the Supreme Court written findings of fact." App. 37a.

The appellate stage of the disciplinary proceedings begins when either the charged attorney or the Commission files with the Indiana Supreme Court a petition for review of the hearing officer's findings or recommendations. App. 38a. After a *de novo* review of the record of the proceedings, the Supreme Court may either adopt the findings and recommendations submitted by the hearing officer or issue its own findings and discipline.

3. *The Events Leading Up to this Case*

In February of 1992 a Kentucky Air National Guard cargo plane crashed in Evansville, Indiana (the "Evansville crash") resulting in death, injury and property damage. Shortly after the Evansville crash, Indiana Supreme Court Chief Justice Randall Shepard and Associate Justice Brent Dickson held a press conference, the purpose of which was to comment upon and call for an investigation into "advertising and solicitation practices [following the Evansville crash] which they perceived as improper." App. 6a-7a. During that press conference, the justices harshly criticized the targeted solicitation of victims of the Evansville crash and called upon the Indiana

Disciplinary Commission to take "firm action" and an "aggressive posture" towards such conduct.

In response to the March 9, 1992 press conference and the request of the Indiana Supreme Court, the Indiana Disciplinary Commission (the "Commission" or "respondent") filed a grievance against petitioner. Respondent pursued its own grievance because none of the private citizens who allegedly had been subjected to these advertising and solicitation practices filed a grievance.

On March 8, 1993 respondent filed a "Verified Complaint for Disciplinary Action and in the Alternative Verified Petition to Enjoin the Unauthorized Practice of Law" (the "complaint") against petitioner. At issue in the complaint was a brochure containing information about petitioner's Washington, D.C. law firm. The complaint alleged that the brochure in question was in violation of the Indiana Rules of Professional Conduct because it contained statements prohibited by the Rules of Professional Conduct, did not bear the words "Advertising Materials," and had not been filed with the Disciplinary Commission.

According to the complaint, five individuals, alleged to be survivors, or families of deceased victims, of the Evansville crash, received the brochure about petitioner's law firm. None of the five individuals were identified as residents of the State of Indiana.

Petitioner is a Washington, D.C. attorney. Petitioner has never been admitted to the Indiana bar, sought admission *pro hac vice* or otherwise practiced law in Indiana. However, in the complaint it was alleged that petitioner violated the Indiana Rules of Professional Conduct or, in the alternative, engaged in the unauthorized practice of law in Indiana.

An answer to the complaint was filed on behalf of petitioner.[2] In the answer it was admitted that a brochure about petitioner's firm was sent to the five named individuals but it was denied that the Indiana Rules of Professional Conduct were applicable. The answer also raised First Amendment and other challenges to the Rules and the proceedings.

4. *The Pre-Hearing Proceedings*

On June 6, 1993 the Indiana Supreme Court issued an "Order Advising Parties of Intended Procedure" in petitioner's case. App. 18a. The court's order indicated it would first consider the issue of jurisdiction over petitioner and, assuming the propriety of jurisdiction, would proceed to appoint a hearing officer to adjudicate the charges against petitioner. App. 18a.

Petitioner promptly filed an objection to the court's intended procedure and a motion to dismiss the charges against him on the grounds that the Indiana Supreme Court could not impartially preside over the controversy. Petitioner argued that the court, through its Chief Justice and an associate justice, publicly had expressed a negative opinion about the conduct at issue, infecting the proceedings with bias. Petitioner's unopposed motion was summarily denied.[3] The charges were not dismissed, nor did the two justices recuse themselves from hearing petitioner's case. App. 19a.

After summarily concluding that it had both subject matter and personal jurisdiction over petitioner,[4] on February 4,

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[2] This action was brought against petitioner and his former law partner, Phillip Allen. This petition for certiorari is brought only on behalf of John P. Coale.

[3] The court ruled, without elaboration, that the Canons 2 and 3 of the Code of Judicial Conduct did not require disqualification.

[4] Respondent filed complaints of misconduct against two other out-of-state attorneys in connection with the events surrounding the Evansville crash. One of those attorneys, Gerald Sterns, filed a motion to dismiss for lack of subject matter and personal jurisdiction. It was generally agreed,

1994 the Indiana Supreme Court appointed Hon. Jeffrey Eggers as hearing officer to preside over the proceedings against petitioner. Shortly after his appointment, Judge Eggers left the bench for private practice; however, he continued to serve as the hearing officer until the conclusion of these proceedings in 2002.

On January 12, 2001, a pre-hearing conference was held before the hearing officer, at which time respondent expressed its intention to forego the introduction of evidence and to rest its case against petitioner on the complaint and the answer. In view of respondent's decision not to introduce new evidence in support of the charges, petitioner also elected not to introduce new evidence in his defense. It was further agreed that both parties would forego oral argument and, in lieu thereof, would submit to the hearing officer briefs arguing the evidence and the law and setting forth proposed findings and conclusions. App. 21a.

5. *The Hearing on the Charges*

On March 23, 2001, the respondent served on petitioner and the hearing officer its "Recitation of Admissions in Lieu of Final Hearing" and "Commission's Brief." Respondent's papers were not filed with the court but, rather, were sent to the law office of the hearing officer. On April 7, 2001 petitioner served his Brief in Opposition to the Charges. Like respondent, petitioner did not file his opposition with the court but sent it to the law office of the hearing officer. At this phase of the proceeding, the fact-finding before the hearing officer, the parties were not required by rule or order to file their briefs with the Indiana Supreme Court and it was their mutual understanding that service upon the hearing

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as implied by the Order Advising Parties of Intended Procedure, the outcome of Sterns' motion would dispose of the jurisdictional issues in petitioner's case. On October 29, 1993 the Indiana Supreme Court summarily denied that motion, citing no legal authority.

officer was sufficient to preserve their arguments for later presentation to the Indiana Supreme Court, if necessary.

In his Opposition to the Charges petitioner made several arguments why judgment should be in his favor. Petitioner argued: 1) the Indiana Supreme Court and the Disciplinary Commission lacked jurisdiction to conduct disciplinary proceedings against petitioner; 2) petitioner was deprived of due process by the bias of the Indiana Supreme Court; 3) the Indiana Rules of Professional Conduct violate the First Amendment; 4) the evidence (i.e. the complaint and the answer) failed to prove that petitioner engaged in any misconduct or in fact did anything; 5) the evidence failed to establish that any of the five individuals named in the complaint were residents of Indiana; 6) the evidence failed to establish that petitioner had no prior relationship with the five named individuals, a prerequisite for the applicability of Rule 7.3 (c) (App. 26a); and, 7) pursuant to Rule 7.1(e), petitioner's brochure did not require an "advertising materials" designation because it was apparent from the context that it was an advertisement (App. 25a). On April 25, 2001 respondent served its reply brief, addressing only the arguments on jurisdiction and the First Amendment.

On June 19, 2001 the hearing officer submitted to the Indiana Supreme Court his findings, conclusions and ruling. In his opinion, the hearing officer expressly acknowledged having received the parties' submissions, including petitioner's brief. On the specific charges, the hearing officer concluded the words "advertising materials" did not appear on the brochure about petitioner's law firm, the brochure contained "self-laudatory" statements and "endorsements or testimonials," and the brochure had not been submitted to the Disciplinary Commission at or prior to dissemination. The hearing officer also concluded that this conduct was "prejudicial to the administration of justice." The hearing officer did not find petitioner guilty of the unauthorized practice of law.

The hearing officer did not consider, and failed to pass upon several of petitioner's arguments, including petitioner's evidentiary arguments. While the hearing officer stated that petitioner "directed solicitation directly to residents of the State of Indiana," he provided no citation to the record evidence to support this statement, nor did he provide a basis for this unsupported conclusion. App. 13a. Of petitioner's remaining evidentiary arguments no mention was made.

6. *The Appeal to the Indiana Supreme Court*

On July 18, 2001 petitioner filed a timely petition with the Indiana Supreme Court seeking review of the hearing officer's findings and recommendations. In his petition for review, petitioner reargued all seven matters previously raised before the hearing officer.

Pursuant to Admission and Discipline Rule 23, respondent had thirty days within which to file a response to petition for review. App. 39a. Seven months later, respondent still had made no filing. Rather than rule upon petitioner's *uncontested* request for review of the hearing officer's findings, on February 18, 2002 the Indiana Supreme Court *sua sponte* issued an order concerning petitioner's request for review.

The February 18th order directed the Disciplinary Commission to respond, six months out of time, to petitioner's filing. The court indicated that respondent should focus its response on the issue of the evidence and whether it had been proven that citizens of Indiana received petitioner's brochure. With regard to this issue, the court, erroneously stated it was raised for the first time on appeal and directed the parties to "show cause why the record should or should not be reopened for the presentation of evidence as to the jurisdictional issue." App. 22a-23a. With the disciplinary proceedings against petitioner concluded and findings of fact issued, the one court with the power to review that judgment suggested that, somehow, the record could be reopened to enable one party,

the Disciplinary Commission, to introduce new evidence essential to its case. Rather than decide the case on the record evidence, the court sought to have the record altered and then decide the matter.

On May 1, 2002, in conformance with the February 18, 2002 order, the Disciplinary Commission responded to petitioner's request for review. The sole argument presented by the response was that, at the commencement of the proceedings in 1993, petitioner failed to allege in his answer that the five named individuals were not citizens of the state of Indiana. Acknowledging that the rules of procedure for disciplinary actions do not require the assertion of affirmative defenses, respondent nevertheless argued that petitioner had an obligation to raise the issue as an affirmative defense. Respondent also requested, as per the suggestion of the court, the re-opening of the proceedings to allow the introduction of evidence on this one point.

On May 15, 2002 petitioner filed a timely reply brief and an objection to the February 18, 2002 order. Petitioner argued, *inter alia*, that the failure to prove petitioner had communicated in any way with a citizen of Indiana *was* properly raised before the hearing officer, during the adjudicative phase of the proceedings and, therefore, the issue was preserved for appeal. In support of this argument, petitioner attached a copy of his brief in opposition to the charges, which had been submitted to the hearing officer, and pointed out the pages on which this argument was raised. Petitioner also strenuously objected to the suggestion that a court of appeals could re-open a concluded lower-court proceeding for the purpose of allowing one party to adduce new evidence and argued that to do so would violate the Due Process Clause. Petitioner asserted that the outrageousness of the court's "show cause" order reflected its bias against petitioner and requested recusal of Chief Justice Shepard and Justice Dickson.

On July 29, 2002 the Indiana Supreme Court issued its order finding petitioner guilty of misconduct. Specifically, the court found: petitioner failed to include the words "advertising material" on his firm's brochure in violation of Indiana Rule of Professional Conduct 7.3(c); the brochure contained "self-laudatory" statements and "endorsements" in violation of Rules 7.1(b) and 7.1(d)(2), respectively; and, the foregoing conduct was "prejudicial to the administration of justice" in violation of Rule 8.4(d). The court, like the hearing officer before it, did not find that petitioner had engaged in the unauthorized practice of law.

In its opinion, the Indiana Supreme Court first held that it had jurisdiction over petitioner. The court reasoned, "any acts which [petitioner took] in Indiana that constitute the practice of law are subject to our exclusive jurisdiction to regulate professional legal activity in this state . . . By directing the solicitations to the prospective clients [petitioner] communicated to those persons that [he] was available to act in a representative capacity for them in Indiana . . . Those acts constituted professional legal activity in this state subject to our regulatory authority." App. 4a. However, the court did not go on to find that petitioner had in fact engaged in the practice of law in Indiana.

After finding jurisdiction was proper, the court considered petitioner's argument that the evidence failed to prove that Indiana residents received petitioner's brochure. On this issue, the court, despite the record, found, "At the fact finding stage of these proceedings, [petitioner] never argued that the targets of the solicitations were not specifically proven to be Indiana residents." App. 5a. The court reached this conclusion by refusing to consider petitioner's brief that had been submitted to the hearing officer because it found no indication that "the document was ever filed before the hearing officer." App. 5a, n.3. The court made no effort to square this reasoning with the opening paragraph of the hearing officer's written opinion, which expressly states that the hearing

officer's findings were made "having received [petitioner's] brief." App. 12a. With petitioner's brief out of the way, the court concluded, with no citation or reference to the record, "the record in this case is sufficient to support the inference that the targets of respondents' solicitations were Indiana residents." App. 5a.

The second, and only other evidentiary issue addressed by the court was petitioner's contention that the evidence failed to prove that petitioner actually did anything. Petitioner and his former partner were charged together in the complaint, which made no effort to specify or separate the acts of petitioner from those of Allen but rather, framed all allegations as to both lawyers. No evidence was later adduced to prove petitioner, as opposed to Allen, performed any of the acts giving rise to the charges. Petitioner argued that under the circumstances to find him guilty would require the imposition of "vicarious" discipline. In response, the court held "[e]ven assuming *arguendo* that Coale was not directly responsible for the dissemination of the solicitations, [he] is responsible for another lawyer's acts *if* [he] ratified the conduct involved or timely knew of conduct taken by a lawyer over whom he had direct supervisory authority and failed to take reasonable remedial action." App. 6a. (emphasis added). However, the court then made no finding that petitioner ratified or knew of any conduct that gave rise to the charges.

The final issue the court chose to address was petitioner's bias argument and the refusal of Chief Justice Shepard and Justice Dickson to recuse themselves. The court admitted that the two justices held a press conference to discuss advertising and solicitation practices "they perceived as improper." App. 7a. However, the court held that no bias was present because "this Court did not direct the filing of a formal grievance against [petitioner] here but merely called for an investigation into solicitation practices following the airplane crash." App. 7a.

The Indiana Supreme Court, like the hearing officer before, failed or refused to consider all of petitioner's remaining arguments.

REASONS FOR GRANTING THE PETITION

Courts have an unflagging obligation to ensure that every litigant, however unpopular, receives a fair hearing before a neutral tribunal. This responsibility is all the more pressing when the tribunal in question is the highest court of the state and, therefore, one from which no appeal lies, save to this Court. The Indiana Supreme Court utterly failed to fulfill that obligation in this case.

This case was plagued with irregularities and constitutional infirmities from the outset. The most basic requirements of due process—a valid exercise of personal jurisdiction, a neutral tribunal, and a meaningful opportunity to be heard—all were absent from this proceeding. What was present was a court, with a clearly expressed point of view, improperly subjecting a non-resident defendant to its jurisdiction and then adjudicating his rights with no regard for the facts or the law. A judgment rendered under these circumstances should not stand; only this Court can ensure that it does not.

The boundaries of due process are necessary restraints on the power of courts. When the highest court of a state refuses to recognize any constitutional check, or other legal limit, on its authority it becomes a threat to, rather than a guardian of, Due Process. This Court has often acted to enforce principles that are essential to public confidence in the judicial system. In so doing, the Court has not hesitated to accept review of cases implicating the right to impartial adjudication or those dealing with the constitutional limits of a state's authority. The Court should do so again here.

I. THE JUDGMENT OF THE INDIANA SUPREME COURT WAS RENDERED IN THE ABSENCE OF PERSONAL AND SUBJECT MATTER JURISDICTION AND IS VOID

For a state court to exercise personal jurisdiction over a non-consenting defendant, two conditions must be met: (1) the applicable state long-arm statute must authorize the assertion of jurisdiction and (2) the exercise of jurisdiction must not violate due process. Neither of these conditions was met here.

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-wide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980). The exercise of personal jurisdiction over a nonresident defendant comports with due process only when "minimum contacts" exist between the defendant and the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "A judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere." *World-wide Volkswagen v. Woodson*, 444 U.S. at 291.

The Indiana Supreme Court's exercise of jurisdiction over petitioner did not comport with the Due Process Clause because the constitutionally required minimum contacts were not present. The allegations of the complaint were facially insufficient to support the exercise of jurisdiction and the evidence never proved the existence of a single contact between petitioner and the State of Indiana. All that was alleged and proven was that a brochure about petitioner's firm was sent to five named individuals. It was neither alleged nor proven that the individuals were from Indiana. There was no allegation or evidence that petitioner practiced law in Indiana, went to Indiana, called Indiana, or took any action whatsoever in or related to the State of Indiana. Under

the circumstances, there were not minimum contacts; indeed, there were no contacts, between petitioner and the State of Indiana.

Even if it were assumed, as it was by the Indiana Supreme Court and the hearing officer, that the five people identified as recipients of petitioner's brochure were from Indiana—an assumption that has no evidentiary basis—minimum contacts sufficient to support a valid exercise of jurisdiction still would not exist. A non-resident subjects himself to the specific jurisdiction[5] of a state only when his forum-related activities are "significant" and create a "substantial connection" with the forum. *Burger King v. Rudzewicz*, 471 U.S. 462, 473-474 (1985). The one-time sending of five brochures into the forum, without more, cannot create the substantial connection needed to subject petitioner to the jurisdiction of an Indiana court.

If the Indiana Supreme Court could exercise personal jurisdiction over petitioner without offending due process, it could not do so consistent with the Indiana's long-arm statute, Trial Rule 4.4, which sets forth the seven activities of a non-resident defendant that can serve as a basis upon which specific jurisdiction may be exercised. App. 40a. Six of these activities are facially inapplicable to the allegations against petitioner; the seventh, which confers jurisdiction over a non-resident based on his "doing any business" in Indiana is inapplicable as a matter of fact and law.

It was alleged that petitioner's law firm sent 5 letters, and enclosures, to certain named persons and that such letters and enclosures constituted "advertising materials." There is no allegation that petitioner or his firm actually obtained any business as a result of the mailings or otherwise engaged in any business dealings in the state or with citizens of the state.

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[5] Because there is no conceivable basis for general jurisdiction, petitioner confines his arguments to specific jurisdiction.

The law of Indiana is clear that, even when directed towards its citizens, such limited activity related to the forum is insufficient to support the exercise of long-arm jurisdiction. *See e.g. Rosowsky v. University of Colorado*, 653 N.E.2d 146 (Ind. App. 1995)(interstate letters and phone calls do not subject non-resident to jurisdiction in the state of the person receiving letters and calls). *See also Brokemond v. Marshall Field & Co.*, 612 N.E.2d 143 (Ind. App. 1993) (advertising in Indiana, delivering merchandise to Indiana, collecting state sales tax, and distributing credit cards within Indiana insufficient to confer jurisdiction upon Indiana court).

Not only did the Indiana Supreme Court lack personal jurisdiction over petitioner, it also lacked subject matter jurisdiction over the controversy. With regard to disciplinary proceedings, the Indiana Supreme Court "has exclusive jurisdiction of all cases in which an attorney who is admitted to the bar of [the] court or who practices law in the state . . . is charged with misconduct." App. 28a. It is undisputed that petitioner is not admitted to the bar of the State of Indiana and the record is devoid of any evidence that he ever appeared before any Indiana court or otherwise practiced law in Indiana. Despite the court's bald, unsupported assertions to the contrary, the sending of five brochures clearly is not the "practice of law." By its own statutory scheme, the Indiana Supreme Court lacked jurisdiction over this matter.

In an effort to circumvent the clear limits of its subject matter jurisdiction, the court reasoned that petitioner's brochure "communicated to [the recipients] that [petitioner and Allen] were available to act in a representative capacity for them in Indiana courts...Those acts constituted professional legal activity in this state subject to our regulatory authority." App. 4a. The court's proffered basis for exercising jurisdiction over petitioner is internally inconsistent and flawed.

At the outset, the court premises its assertion of subject matter jurisdiction upon acts taken "in Indiana that constitute

the practice of law" (App. 4a); however, the sending of a brochure hardly constitutes the practice of law in Indiana or anyplace else. The portions of the brochure quoted in the complaint reflect no legal advice or discussion of the law at all. Moreover, although he was charged, petitioner was not found guilty of the unauthorized practice of law. The court's conclusion that petitioner's brochure constituted the practice law in Indiana, and therefore conferred subject matter jurisdiction on the court, is unsupported and conflicts with its own conclusion that petitioner was not guilty of the unauthorized practice of law.

The second faulty premise in the court's reasoning is that by allegedly sending brochures to people in Indiana, petitioner held himself out as an attorney who could represent them in Indiana courts. The complaint alleged no statement by petitioner that could give rise to this inference. Moreover, in view of the nature of the legal issues confronted by these five people, there is nothing that would require their claims to be heard in Indiana. The Evansville crash involved a plane and a pilot that took off from Kentucky and was owned by the federal government. Like many aviation disasters, it gave rise to a dispute implicating the interests of different states and the federal government.

The court's analysis of its subject matter jurisdiction is without foundation in the law of Indiana or the facts of this case. What the court fails to address, and what it cannot escape, is the limited grant of authority contained in the Indiana Rules of Admission and Discipline.

The Indiana Supreme Court was without jurisdiction over the person of petitioner and over the subject of the proceedings. When it presided over the matter and imposed discipline on petitioner, the court exceeded its authority as defined by state and federal constitutional law, violating petitioner's due process rights and "reach[ing] out beyond the limits imposed on [states] by their status as coequal

sovereigns in a federal system." *World-wide Volkswagen v. Woodson*, 444 U.S. at 292. Review by this Court is necessary to cure this flagrant constitutional violation.

II. THE INDIANA SUPREME COURT COULD NOT AND DID NOT CONSTITUTE THE NEUTRAL TRIBUNAL DUE PROCESS DEMANDS

No proposition is more firmly established than that due process requires a neutral decision-maker, free from prejudgment or bias. As expressed by this Court, "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This basic requirement mandates a tribunal impartial in fact and appearance. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

The requirement of a neutral tribunal means "no man is permitted to try cases where he has an interest in the outcome." *In Re Murchison*, 349 U.S. at 136. This Court has never characterized, or limited, the nature of self-interest that will serve to constitutionally disqualify a judge but rather, has recognized "that interest cannot be defined with precision." *Id.* In each case, "[c]ircumstances and relationships must be considered." *Id.* Personal feelings on the part of a judge may give rise to circumstances where disqualification is constitutionally required. *Offut v. United States*, 348 U.S. 11 (1954) (trial judge who had become personally embroiled with counsel could not preside over contempt proceeding); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (trial judge had been personally attacked by defendant throughout the trial could not preside over contempt proceeding). Prior participation in the prosecution of a case and extra-judicial exposure to the evidence or other aspects of the proceedings also have been found by this Court, in some circumstances, to require recusal. *In Re Murchison*, 349 U.S. 133 (1955)(judge who had served as judge-grand-jury could not preside over criminal trial).

In Indiana, the Supreme Court is the "ultimate fact finder in an attorney disciplinary proceeding." *In re Moore*, 453 N.E.2d 971 (Ind. 1983). After Chief Justice Shepard and Justice Dickson held a press conference to publicly condemn the alleged conduct that gave rise to the proceedings against petitioner and called for an investigation into and an "aggressive posture" towards such conduct, the "ultimate fact-finder" in petitioner's case was no longer the neutral tribunal due process demands.

The justices were not merely expressing their views on attorney advertising in a generalized fashion and in response to an inquiry. On the contrary, they convened a press conference for the purpose of making known their negative views concerning targeted solicitation of the Evansville crash victims. In so doing, the justices assumed a clear stance on the issue: solicitation of the victims was improper and should be investigated. Indeed, the court's opinion imposing discipline on petitioner unequivocally states, "Chief Justice Randall Shepard and Justice Brent Dickson held a press conference during which they called for an investigation into the advertising and solicitation practices which *they perceived as improper.*" App. 7a. (emphasis added). In other words, the justices had pre-judged the matter and, by their own admission, before hearing the case on the merits, had determined that the conduct at issue was improper.

By calling for an investigation, the justices not only expressed their personal views on a matter they would later be charged with adjudging, they also became a part of the prosecutorial process. It is uncontested that no private citizen of the State of Indiana ever filed a complaint of misconduct against petitioner. It is also uncontested that at the time of the March 9, 1992 press conference the Disciplinary Commission, having not received any complaints of misconduct, had not filed a grievance against petitioner. The grievance that ultimately was filed was in response to the call for an investigation by the Indiana Supreme Court justices, who thereby

became the true complainants against petitioner. Having been a part of that process the justices could not be, "in the very nature of things, wholly disinterested in the [outcome]." *In Re Murchison*, 349 U.S. at 137. Chief Justice Shepard and Justice Dickson had crossed the line separating neutrality from partisanship.

The pre-complaint conduct of Chief Justice Shepard and Justice Dickson also revealed that they were in possession of knowledge acquired outside of the proceedings. At the time of the press conference there was no ongoing proceeding or investigation into the solicitation practices denounced by the justices. In calling for an investigation, the justices necessarily were considering information they received outside of the proceedings. Accordingly, Chief Justice Shepard and Justice Dickson were acting on personal knowledge, gained from an unknown source, the credibility of which was untested by the adversarial process.

As this Court has recognized, such personal knowledge on the part of a judge jeopardizes the fairness of the proceedings. When a judge presides over a controversy bringing with him personal knowledge of the disputed facts, due process is compromised by the likelihood that the judge will rely "on his own personal knowledge and impression of what [occurred], an impression that 'could not be tested by adequate cross-examination.'" *Withrow v. Larkin*, 421 U.S. 35, 53 (1975) (quoting *In Re Murchison*, 349 U.S. 1t 138). By itself, the extra-judicial acquisition of information might not rise to the level of a constitutional infirmity in the process; however, in the context of this case, where the supreme court justices had publicly taken a stance on the matters at issue in the proceeding and had directed the initiation of the action against petitioner, it is but one more clear indication that the tribunal charged with adjudging petitioner's rights was not free from prejudgment and bias.

The manner in which the Indiana Supreme Court presided over this matter leaves no room for doubt that judicial bias was not only likely under the circumstances but, in fact, characterized the proceedings. The court ruled against petitioner on every motion he filed, even those that were consented to or uncontested. For example, petitioner filed a *consent* motion to stay the proceedings that was granted by the hearing officer: subsequently, the supreme court *sua sponte* denied the motion. In ruling against petitioner, the court never once cited to legal authority but rather, denied, in summary fashion, any type of relief sought by petitioner.[6] It is within the realm of possibility that all of these rulings were made in good faith and on the merits; however, the court's order of February 18, 2002 rebuts any presumption of even-handedness that may have existed up to that point.

The February 18, 2002 order of the Indiana Supreme Court, authored by the Chief Justice, was an effort to assist respondent with the prosecution of its case. Having reviewed petitioner's request for review of the hearing officer's findings, the court apparently became concerned that petitioner might just prevail on his argument that the evidence failed to prove that any citizen of Indiana received petitioner's brochure. In an effort to avoid this result, the Chief Justice, in the longest order issued during the nine-year history of the case, *ordered* the respondent to file a grossly late response to the petition for review, told respondent the arguments to make, and, finally, in a complete abdication of its duty to preside neutrally, as a reviewing court, the court directed the parties "to show cause why the record in this case should or

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[6] Petitioner filed motions and briefs of considerable length and detail, providing legal citations for every proposition. Petitioner's motions, were ruled on in one paragraph, two at the most, with none of the legal arguments addressed in any meaningful fashion. *See* App. 19a-20a.

should not be reopened for the presentation of evidence as to the jurisdictional issue."[7] App. 22a-23a.

The Indiana Supreme Court was charged with reviewing the findings and recommendations of the hearing officer, *de novo*, and issuing a decision. Its role was to serve as an appellate court. Instead, the court sought to involve itself in the proceedings by suggesting arguments to the respondent, waiving its own rules for the benefit of respondent, and implicitly endorsing a wholly unlawful procedure whereby the record would be changed before the court made its decision on review. By suggesting a reopening of the record of this concluded proceeding for the purpose of allowing one party (respondent) to adduce evidence crucial to its case, the Indiana court revealed its "deep-seated . . . antagonism or favoritism that [made] fair judgment impossible." *Lidetky v. United States*, 510 U.S. 540, 555 (1994).[8]

Even if the Indiana Supreme Court could have judged this matter without bias, it could not have done so without the appearance of bias, as due process requires. As this Court has recognized, and often reiterated

> [J]ustice must satisfy the appearance of justice . . . and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the

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[7] Ultimately, the court elected not to press forward with the reopening of the concluded case. Respondent offered no real argument and no legal authority in support of the proposition that the case should be reopened while petitioner filed a strenuous objection to the "show cause order." Subsequently, the court simply ignored the issue, as though it had never raised it in the first place.

[8] Petitioner does not suggest that the court's rulings standing alone prove bias of the type that would require recusal as a constitutional matter. Petitioner asserts that the conduct of Chief Justice Shepard and Justice Dickson, indicated that they had prejudged the controversy; the rulings of the court stand as the direct result, and evidence of, that prejudgment.

> contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice.'

Murchison, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The very public conduct of the Chief Justice Shepard and Justice Dickson in connection with these proceedings manifested a bias against petitioner and tainted the proceedings with, at a minimum, the appearance of partiality, which rendered the proceedings constitutionally infirm.

"The requirement of neutrality has been jealously guarded by this Court." *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980). Recognizing the paramount importance of a disinterested tribunal, the Court has frequently granted review to safeguard the due process requirement of judicial impartiality. In this case there was neither the appearance nor the reality of impartiality. While "most questions concerning a judge's qualifications to hear a case are not constitutional ones," questions of actual bias are. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). The constitutional "floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant. . ." *Id.* (*quoting Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). In view of the naked bias that characterized these proceedings, review plainly is appropriate and necessary.

III. THE DECISION OF THE INDIANA SUPREME COURT IS CLEARLY ERRONEOUS

In these proceedings respondent was charged with proving by clear and convincing evidence that petitioner violated the Indiana Rules of Professional Conduct. The clear and convincing standard is a stringent one and cannot be met through speculation, inference or guesswork. The sole source of record evidence in this case, as agreed by the parties, was the complaint and the answer. This evidence did not establish

any misconduct by petitioner; in fact it failed to prove even the most basic elements of the charged offenses. In finding petitioner guilty on this woefully anemic record, the Indiana Supreme Court not only abdicated its responsibility to conduct a dispassionate *de novo* review of the record but also deprived petitioner of a meaningful opportunity to be heard by refusing to consider his dispositive evidentiary arguments.

A. There Was No Evidence Petitioner Violated the Indiana Rules of Professional Conduct Because There Was No Evidence Any Indiana Resident Received Petitioner's Brochure

It is not disputed that the record contained no evidence about the residence of the five recipients of petitioner's brochure. The complaint did not identify them as citizens of Indiana but merely stated their names. The answer admitted that brochures were sent to the named people. Accordingly, the record evidence was devoid of any allegation or proof that petitioner's brochure was sent to or received in the State of Indiana. Obviously, this omission was, or should have been, fatal to respondent's case; however, the Indiana Supreme Court committed a plain, indeed glaring and deliberate error through which this result was avoided.

At the outset, the court admitted "the verified complaint, while listing the names of the persons to whom the respondents directed communications, *does not specifically allege that they were residents of Indiana.*" App. 5a. (emphasis added). The court then proceeded to provide its reasons as to why this utter failure of the evidence doesn't matter. First and foremost among the court's erroneous reasons, was the finding that "at the fact-finding stage of these proceed ings . . . Coale never argued that the targets of the solicitations were not specifically proven to be Indiana residents." App. 5a. Accordingly, it was held, petitioner had "waived the argument upon review." App. 5a-6a. This finding is simply wrong. In petitioner's Brief In Opposition to the Charges,

which was submitted to the hearing officer, petitioner argued that the evidence failed to prove his firm's brochure was sent to or received by any resident of Indiana. App. 46a, 62a. Petitioner's submission to the hearing officer was the appropriate time and vehicle for making this argument, *i.e.* after the close of the evidence, in argument to the judge. The only way the court could conclude that petitioner failed to raise the issue during the fact-finding was by ignoring petitioner's submission to the hearing officer as though it did not exist, which is exactly what the court did.

There can be no doubt that, during the adjudicative phase of the proceedings, the hearing officer received and considered petitioner's brief submitted in opposition to the charges. The hearing officer's decision plainly states, "Comes now the Hearing Officer in this matter and having received the Indiana Supreme Court Disciplinary Commission's . . . submission of a brief in resuscitation (sic) of admissions and *having received the Respondents*[9] *brief* . . . does now find, conclude and rule as follows . . ." App.14a (emphasis added).[10] Despite the plain language of the hearing officer's ruling, the court found that, without a file stamp, there was no indication that "the document [*i.e.* petitioner's brief] was ever filed before the hearing officer." App. 5a. With this fiction, the court effectively wiped out, and relieved itself from having to consider, petitioner's dispositive evidentiary argument and ensured petitioner would not prevail, no matter how strong his position or how weak the evidence.

As the Indiana Supreme Court well knew, the hearing officer was a civilian attorney, not a judge associated with a court from which "file-stamped" copies could be obtained. Neither petitioner nor respondent filed their submissions to

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[9] Petitioner was the respondent below.

[10] The hearing officer also discusses a footnote in petitioner's brief, a further indication that he both received and reviewed it.

the hearing officer with the Indiana Supreme Court, nor were they required to do so. The refusal to accept the validity of petitioner's brief was an artifice through which the court could ignore petitioner's argument.

Perhaps recognizing the weakness of its position, the court asserted additional "reasons" why it was entitled to ignore petitioner's properly preserved evidentiary argument about the failure to prove that Indiana residents received his brochure. First, the court suggested petitioner had an obligation to raise this issue in his answer (filed in 1993). In support of this notion the court cites to Admission and Discipline Rule 23 (14)(b), which provides, "an answer shall admit or controvert the averments set forth in the complaint . . . averments in the complaint are admitted when not denied in the answer." App. 5a, n.5. The problem with the court's suggestion is two-fold: it relies on the 2002 version of Rule 23, rather than the 1993 version, which *did not contain the language quoted by the court,*[11] and, more importantly, it fails to elaborate how or why petitioner should admit or deny an averment everyone agrees does not appear in the complaint.

Contrary to the position of the Indiana Supreme Court, petitioner had no obligation to raise deficiencies in the evidence until the close of the evidence. The burden of proving each and every element of the offenses charged was at all times on respondent; it was not the responsibility to petitioner to advise respondent that, by resting on the pleadings, it would not meet its burden of proof. Petitioner had the right to put respondent to its proof and then to challenge the sufficiency of it through argument: that is the adversarial process.

Beyond its improper rejection of petitioner's evidentiary argument, the court offered no basis for finding the "evidence" sufficient to prove Indiana residents received petition-

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[11] Obviously, petitioner's answer was governed by the rule then in effect, the text of which appears at App. 28a-39a.

er's brochure. The court simply concluded, "Upon review of the evidence in the case, the hearing officer concluded that the targets of the solicitations were Indiana residents. Accordingly, we find that the record in this case is sufficient to support the inference that the targets of the respondents' solicitations were Indiana residents." App. 5a. Yet, the hearing officer's decision is devoid of any indication that he actually considered this issue and found it as a matter of fact; moreover, the Indiana Supreme Court was charged with conducting a *de novo* review of the evidence, not blindly accepting conclusory statements by the hearing officer that have no support in the record.

The Indiana Supreme Court's finding that the people who received petitioner's brochure were from Indiana is not only clearly erroneous, it is arbitrary and capricious. The record is not in equipoise or fairly debatable on this point; it is silent and can offer no support for the court's conclusion. A fact-finder is not free to disregard uncontroverted evidence. *See Chesapeake & O.Ry.O v. Martin*, 283 U.S. 209, 216 (1931).

In the absence of any evidence that petitioner contacted any person in the State of Indiana, there can be no evidence that Indiana's Disciplinary Rules were violated. In order to prove a violation of any of the Disciplinary Rules, there must be some evidentiary basis upon which to base their applicability. With no record evidence that petitioner contacted any citizen of Indiana or did anything in the State of Indiana, there is no basis upon which to find that Indiana's Disciplinary Rules were applicable in the first instance.

B. The Evidence Failed to Prove Petitioner Performed Any Act that Gave Rise to the Allegations of the Complaint

Even if the evidence established that residents of Indiana received the brochure about petitioner's firm, which it plainly did not, there was no record evidence from which the court

could have concluded that it was petitioner who sent or authorized the sending of "the offending materials." App. 6a. The only evidence in this record is the joint answer of petitioner and Philip Allen. In that answer it is admitted that a brochure about petitioner's law firm was sent to five people, the brochure contained the statements quoted in the complaint, and the brochure did not bear the words "Advertising Materials." None of this evidence was sufficient to establish any wrongdoing by petitioner.

Disciplinary proceedings are, by their very nature, individual proceedings against individual attorneys. Theories of vicarious liability may be not be used to establish misconduct. There must be clear and convincing evidence that the individual attorney committed the charged act, or acts, of misconduct. The evidentiary record in this proceeding contains no evidence that petitioner did anything. The evidentiary record does not reflect from whom the materials were allegedly sent—whether Coale, Allen or some third party—and, therefore, fails to establish who, if anyone, is guilty of the misconduct charged. This evidentiary flaw should have been fatal to all of the Commission's allegations; however, the court held that petitioner could be found guilty of misconduct on this record because he was responsible for another lawyer's acts if he "ratified the conduct involved" or if he knew of it and failed to take remedial action. The proposition stated by the court is true, but it has no application here because there was no *evidence* petitioner ratified or knew of any conduct giving rise to the charges.

The court's holding assumes, without evidence, that petitioner played some part in sending this brochure. The court may not substitute its unproven assumptions for clear and convincing evidence and it erred in doing so.

C. The Evidence Failed to Establish That Petitioner's Brochure Required a Designation as "Advertising Materials"

Petitioner was found guilty of violating Rule 7.3(c), which requires attorney advertising materials to be filed with the Disciplinary Commission prior to or at the time of dissemination and to bear the words "advertising material." App. 26a. This finding was clearly erroneous because respondent failed to prove that Rule 7.3(c) applied to petitioner's brochure in the first instance. Pursuant to Rule 7.3(c), an "advertising materials" designation is *only* required on materials sent to a person "with whom the lawyer has no prior personal or professional relationship." App. 26a. There was no allegation or proof that petitioner or his firm had no prior personal or professional relationship with the recipients of the brochure. Without establishing the applicability of Rule 7.3(c) in the first instance respondent could not establish a violation of Rule 7.3(c).

In finding that petitioner violated Rule 7.3(c), the court did not consider whether respondent proved an "advertising materials" designation was required. Had the court addressed this evidentiary failing, as was its obligation, it could not have found a violation of Rule 7.3 (c). The holding of the court that petitioner violated Rule 7.3(c) was clear error.

D. The Court Violated Petitioner's Right to Due Process by Intentionally Ignoring His Arguments on the Evidence

There was a complete failure of the evidence in this case and, in the end, none of the charges of misconduct was proven by any measure, much less by clear and convincing evidence. But the court's decision was not mere error: it was the end result of the intentional refusal to consider petitioner's arguments and the record evidence. By refusing to consider petitioner's properly preserved arguments, the

Indiana Supreme Court denied petitioner "the fundamental right of due process [which] is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The right to be heard would be meaningless if it did not include the right to make arguments upon the evidence and have those arguments ruled upon. When the arguments of a defendant are not considered or ruled upon at all it is irrelevant for due process purposes that he was allowed to present them on paper. "An opportunity to be heard includes . . . the right to make arguments and receive judicial findings based upon the evidence and the arguments." *Miller v. Industrial Hardwoods Corp.*, 775 N.E.2d 1168, 1171 (Ind. App. 2002). Petitioner was not afforded that right.

CONCLUSION

The petition for certiorari should be granted. When the highest court of a state violates every fundamental due process right of a litigant this Court should act to preserve the integrity of the American legal system.

Respectfully Submitted,

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